

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of )  
)  
Promotion of Competitive )  
Networks in Local )  
Telecommunications Markets )  
)  
Wireless Communications Association )  
International, Inc. Petition for )  
Rulemaking to Amend Section 1.4000 )  
of the Commission's Rules to Preempt )  
Restrictions on Subscriber Premises )  
Reception or Transmission Antennas )  
Designed to Provide Fixed )  
Wireless Services )  
)  
Cellular Telecommunications Industry )  
Association Petition for Rulemaking )  
And Amendment of the Commission's )  
Rules to Preempt State and Local )  
Imposition of Discriminatory and/or )  
Excessive Taxes and Assessments )  
)  
Implementation of the Local )  
Competition Provisions in the )  
Telecommunications Act of 1996 )

WT Docket No. 99-217

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FEDERAL COMMUNICATIONS COMMISSION  
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CC Docket No. 96-98

**COMMENTS OF GLOBAL CROSSING LTD.**

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## SUMMARY

On July 7, 1999, the Commission released a Notice of Inquiry ("NOI") in the above-captioned docket seeking comments on state and local management of public rights-of-way and the franchise fees imposed upon the users of such rights-of-way, including particular experiences telecommunications providers have had with public rights-of-way management. Global Crossing has experienced first-hand the increased costs and potential delays in deployment that can result from regulatory overreaching by state and local governments.

Global Crossing respectfully urges the Commission to adopt rules clarifying the boundaries of state and local government authority over matters ancillary to their management of public rights-of-way, and establish a governing framework that permits state and local governments to fulfill their legitimate role as managers but prohibits regulatory overreaching. Substantively, the rules should establish parameters of appropriate rights-of-way management and address three major factors: the proper scope of state and local governments' management authority, limitations on unrelated conditions, and excessive compensation schemes imposed upon competitive providers. Procedurally, the rules should set forth a time frame by which state and local governments must act on requests for access to rights-of-way, as well as expedited dispute resolution procedures.

Without rules firmly in place at a federal level addressing these issues, state and local governments across the country will continue to have the power to extract a litany of burdensome concessions, with new providers having no choice but to comply with unfair and unlawful requests for concessions or face impermissible delays in approval of essential inputs to their systems. This proceeding provides the Commission with a unique opportunity to level the playing field, and Global Crossing urges the Commission to take the necessary action to ensure that Congress' goal of promoting competition in the market for all communications services and facilities is attained.

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**COMMENTS OF GLOBAL CROSSING LTD.**

Global Crossing Ltd. ("Global Crossing"), by its undersigned counsel, hereby submits these comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding.<sup>1</sup>

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<sup>1</sup> Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third FNPRM in CC Docket No. 96-98, *Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, FCC 99-141, WT Docket No. 99-217, CC Docket No. 96-98 (rel. July 7, 1999).

## INTRODUCTION

On July 7, 1999, the Commission released a combined Notice of Proposed Rulemaking ("NPRM") and Notice of Inquiry ("NOI") in the above-captioned docket seeking comments as to how to best promote competitive networks in local telecommunications markets. To reach this goal, the Commission will "focus specifically on eliminating certain barriers to facilities-based competition." NPRM ¶ 19. In particular, the NPRM focuses on competitive access to buildings and rooftops and the NOI focuses on state and local management of public rights-of-way and the franchise fees imposed upon the users of such rights-of-way. In its Order dated August 6, 1999, the Commission established separate pleading cycles for comments being submitted in the NOI, and Global Crossing accordingly files these comments on the NOI issues.

As a new competitor in the telecommunications marketplace, and based on its own experiences in deploying the U.S. portion of its global network, Global Crossing believes that the Commission has correctly identified right-of-way access as a factor that can significantly affect both the pace and cost of competitive entry. Accordingly, Global Crossing strongly supports the Commission's efforts to eliminate unnecessary and unreasonable barriers imposed by state and local management and control of rights-of-way, which are critical inputs into the deployment of next generation telecommunications networks.

The Commission has previously found that "[o]ne of the fundamental goals of the Telecommunications Act of 1996 is to promote innovation and investment by multiple market participants in order to stimulate competition for all services, including broadband communications services," and has further found that such competition encompasses the deployment of "last mile" and backbone facilities for the provision of these services. Report, *Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Manner*, FCC 99-5, CC Docket No. 98-146 ¶ 1 (rel. Feb. 2, 1999). Recognizing the importance of several necessary inputs to full facilities-based

competition, the Commission's NOI seeks comment as to the ability of competitive providers to gain access to public rights-of-way, and the payment of franchise fees in connection with such access. Global Crossing has experienced first-hand the increased costs and potential delays in deployment that can result from regulatory overreaching by state and local governments based on their control over necessary rights-of-way. The Commission must ensure that Congress' intent to limit state and local authority in this area to its proper sphere is fulfilled, so that artificial barriers are not allowed to limit competition.

## **DISCUSSION**

### **I. GLOBAL CROSSING'S INTEREST IN THIS PROCEEDING**

#### **A. Description Of Global Crossing And Its Business**

Global Crossing has emerged as the world's first independent provider of global telecommunications facilities and services, utilizing a network of undersea digital fiber-optic cable systems and associated terrestrial backhaul capacity.<sup>2</sup> Specifically, Global Crossing is building five U.S.-based, fiber-optic cable systems, plus terrestrial systems in Japan, Europe, South America and the United States. The Company believes it will be the first to offer its customers access to multiple destinations worldwide through "one-stop shopping."

Global Crossing's submarine cable systems have U.S. landings in Washington State, California, New York, Florida and St. Croix, U.S. Virgin Islands. Each of these landings crosses state-controlled sovereign submerged lands, typically requiring leases or similar agreements from state agencies for the systems to land. In addition, because cable stations are located several blocks or further inland from the landing point, the land portion of a submarine cable typically crosses public rights-of-way, requiring a franchise, ordinance or other similar approval from the respective local government.

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<sup>2</sup> On September 28, 1999, Global Crossing completed its merger with Frontier Corporation, an integrated provider of local, long distance, cellular, paging, data and Internet services.

Global Crossing, through its US Crossing subsidiary, is also constructing a terrestrial backhaul network from each of its cable stations to inland telehouses. These backhaul systems also use public rights-of-way, and thus also require approvals to use the rights-of-way from numerous jurisdictions over a given route.

**B. Global Crossing Has Experienced Regulatory Overreaching By State And Local Governments Which Has Increased Its Costs Of Deployment**

In its NOI, the Commission asks for comment on particular experiences telecommunications providers have had with rights-of-way management, including examples of problems, successful solutions and information regarding the prevalence of these types of experiences. *See* NOI ¶ 79.

Beginning with the construction over two years ago of Atlantic Crossing, its first submarine cable system, Global Crossing, through its project companies and system contractors, has negotiated or is in the process of negotiating the use of public rights-of-way crossing submerged lands with state agencies in California, Washington State, New York, Florida, and St. Croix, the U.S. Virgin Islands.<sup>3</sup> While, historically, submerged lands users have often been charged a fee based on the appraised value of adjacent land or some similar measure, state agencies controlling submerged lands have increasingly expressed an interest in appropriating for themselves a share of the growth in the telecommunications sector, by imposing fees that are significantly inflated over the levels of just a year ago. For example, Global Crossing is aware of a "special meeting" of an association of state land commissioners on rights-of-way for fiber optic cable, in which various states have sought to develop a "common approach" to valuing and negotiating rights-of-way. According to the meeting agenda, the purpose of the meeting was to:

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<sup>3</sup> Landing a submarine cable invariably requires access to state owned submerged or aquatic lands, such as tidelands, shorelands and beds of navigable waters. Coastal states typically have state statutes governing the grant of easements and rights-of-way to telecommunications providers for the construction and installation of telecommunications facilities over submerged lands owned by the state. These statutes typically authorize a state

[p]rovide an opportunity for Land Commissioners to meet to discuss current and expected future demand for use of state-owned lands for rights-of-way for fiberoptic cable, understand the true market values involved, and *lay the foundation for a common approach to valuing, negotiating, and administering these rights-of-way* (emphasis added).

Developing a common approach among states for administering rights-of-way may make practical sense. However, an agreement among states on a common approach for *valuing and negotiating rights-of-way* inhibits market forces that might otherwise limit rights-of-way fees that states may impose, raising serious competitive concerns.

A particularly troubling trend are efforts by agencies to seek rights-of-way fees based on some percentage of revenue generated from the system using the right-of-way. As discussed, *infra* at Section III.B.3, such revenue-based fees raise serious questions under Section 253, both in terms of whether such a fee is “reasonable,” and also whether such a fee can be nondiscriminatory and competitively neutral when previous projects have paid substantially lower fees.

Global Crossing’s submarine cable project companies and its US Crossing subsidiary have also been granted access to rights-of-way by local governments in the states where Global Crossing cables land in order to access cable stations and in connection with the construction of terrestrial backhaul systems between the cable stations and inland telehotels. A number of state laws flatly prohibit the imposition of franchise and similar fees on telecommunications providers for use of public rights-of-way, or otherwise cap the fee that a municipality may charge for access to its rights-of-way.<sup>4</sup> Despite these state law limitations, Global Crossing is aware of situations where municipalities have sought rights-of-way fees where none are permitted, or that are grossly in excess of state statutory ceilings. Local governments have also required capital

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agency to charge a rental fee, lease payment, or similar payment for use of the right-of-way. There appears to be little uniformity in the basis for the fees permitted under state law.

<sup>4</sup> See e.g., Rev. Code Wash. § 35.21.860 (1999).



improvements in the form of free conduit and other rights-of-way improvements, despite state statutes prohibiting municipalities from charging telecommunications providers franchise fees.

The reality is that given the critical importance to new providers, such as Global Crossing, of rapidly deploying facilities and meeting ready-for-service ("RFS") targets, state and local rights-of-way holders have new providers over a barrel: providers can either comply with unfair and unlawful requests for concessions, or face impermissible delays in approval of essential inputs to their systems. This burden also falls unevenly on new providers who are only now deploying facilities, as opposed to incumbents who already have facilities in place. This proceeding provides the Commission with a unique opportunity to level the playing field, as envisioned by Section 253, and put in place rules that prevent state and local governments from abusing their control over rights-of-way to the detriment of new facilities-based competition.

## **II. ALTHOUGH THERE IS A LEGITIMATE SPHERE WITHIN WHICH STATE AND LOCAL GOVERNMENTS ARE PERMITTED TO MANAGE PUBLIC RIGHTS-OF-WAY, REGULATORY OVERREACHING MUST BE STOPPED**

### **A. Section 253 Of The Communications Act Prohibits State And Local Governments From Impairing Competitive Providers' Ability To Deploy Telecommunications Facilities**

To carry out its goal of promoting competition in the market for all communications services, "Congress adopted sweeping restrictions on the authority of state and local governments to limit the ability of telecommunications companies to do business in local markets." *Bell Atlantic-Maryland, Inc. v. Prince George's County, Md.*, 1999 U.S. Dist. LEXIS 7978, \*21 (D. Md. May 24, 1999)(citing *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. 721, 726 (1999))("*Prince George's County*"). Section 253(a) of the Communications Act, added by the Telecommunications Act of 1996, provides that "[n]o state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

At the same time, Section 253(c) recognizes a legitimate role for state and local governments in managing the public rights-of-way, but imposes on these governments the requirement that any compensation for use of public rights-of-way be fair, reasonable, competitively neutral and non-discriminatory, and imposes a requirement of non-discrimination with respect to use of public rights-of-way, as well:

[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

-- *Id.* § 253(c).

Section 253 thus establishes a framework that recognizes legitimate interests of state and local governments but also protects competitive providers from regulatory overreaching.

**B. Rapid Deployment of Competitive Networks Requires Nondiscriminatory, Competitively Neutral Access To Rights-of-Way, And The Containment Of Regulatory Overreaching By State And Local Governments**

The NOI recognizes that state and local governments are responsible for ensuring that rights-of-way are used in a manner that does not threaten public safety, unnecessarily inconvenience the public, or impose uncompensated costs, but emphasizes the need for nondiscriminatory, competitively neutral access to public rights-of-way. Incumbents have long been granted authority to use these rights-of-way and have extensive facilities already in place. Global Crossing fully supports the Commission's assessment that "[f]ull and fair competition . . . requires that competing providers have comparable access . . . [which] may involve the ability to utilize public rights-of-way in a manner, on a scale, and under terms and conditions similar to those applicable to the incumbent LECs' use of public rights-of-way." NOI ¶ 71.

The Commission has also previously expressed concern "that some local governments 'appear to be reaching beyond traditional rights-of-way matters and seeking to impose a redundant 'third tier' of telecommunications regulation' on top of traditional state and federal

regulation consistent with the Communications Act, as amended.\*\*\* Such regulations are difficult to justify as 'within the scope of permissible local rights-of-way management authority or other traditional municipal concerns.'" Memorandum Opinion and Order, *Matter of Classic Tel., Inc.*, 12 FCC Rcd 15619 ¶ 34 (1997)(citing *Matter of TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396 (1997))("Classic Telephone").

As described above by Global Crossing, and as experienced by numerous other carriers, state and local governments have in fact stepped outside the boundaries of their legitimate authority to manage the public rights-of-way, often extracting or seeking to extract unwarranted, discriminatory, and insupportable concessions from competitive providers. This regulatory overreaching can impede, delay and raise the costs of facilities-based entry, disproportionately imposing these costs on new entrants, such as Global Crossing, who are deploying competitive broadband facilities to meet the growing demand for bandwidth to handle Internet, data, video and voice traffic.

### **III. THE COMMISSION SHOULD ADOPT RULES CLARIFYING THE BOUNDARIES OF STATE AND LOCAL GOVERNMENT AUTHORITY OVER MATTERS ANCILLARY TO THEIR MANAGEMENT OF PUBLIC RIGHTS-OF-WAY**

#### **A. The FCC Should Establish A Governing Framework That Permits State And Local Governments To Fulfill Their Legitimate Role As Managers Of Public Rights-Of-Way But Prohibits Regulatory Overreaching**

The Commission is expressly granted authority pursuant to Section 253(d) to preempt any state or local statute, regulation or other legal requirement that may prohibit or may have the effect of prohibiting an entity's provision of telecommunications services in violation of Section 253(a). As discussed below, right-of-way management and compensation practices that impose significant costs and burdens on telecommunications providers can rise to the level of creating such a barrier to entry in violation of Section 253(a), and therefore may be preempted by the Commission. In order to implement this authority, the Commission should adopt rules

establishing the permissible scope of state and local authority over rights-of-way, including rules relating to appropriate compensation for rights-of-way access.

In its NOI, the Commission discusses several recent court decisions, as well as decisions of its own, interpreting Section 253 and the proper scope of state and local government authority to manage public rights-of-way. These decisions set forth a sound basis for an interpretation of Section 253 that provides clear guidance as to the appropriate scope of state and local management authority. As stated in the *Prince George's County* decision:

any 'process for entry' that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decisionmakers to grant or deny permission to use the public rights-of-way 'may . . . have the effect of prohibiting' the provision of telecommunications services in violation of [Section 253]."

-- *Prince George's County*, 1999 U.S. Dist. LEXIS at \*24.

The Commission should build on this basis and adopt both substantive and procedural rules concerning access to public rights-of-way. Substantively, the rules should establish parameters of appropriate rights-of-way management, including provisions governing compensation schemes and the requirements being imposed as conditions of grant. Procedurally, the rules should set forth a time frame by which state and local governments must act on requests for access to rights-of-way, as well as expedited dispute resolution procedures.

The public interest would be served by implementing a unified framework governing these issues. The establishment of clear and sound rules would provide regulatory certainty, a decrease in litigation and its attendant costs, and speed deployment of competitive networks. The Commission has already recognized the deleterious effects that unreasonable delays have on the development of facilities-based competition, noting that "[i]f a potential entrant is unable to secure the necessary regulatory approvals within a reasonable time, it may abandon its efforts to enter a particular market based solely on the inaction of the relevant government authority."

*Classic Telephone*, 12 FCC Rcd ¶ 28. The Commission has also recognized that "local

telecommunications regulations that vary from community to community will very likely discourage the development of competition." *Id.* ¶ 34. Uniformity of rules and procedures is thus essential in this area.

**B. The Commission's Rules Should Define The Scope Of State And Local Authority, And Prohibit Unrelated Conditions And Excessive Compensation**

Three major factors should be addressed by FCC rules: the proper scope of state and local governments' management authority, limitations on unrelated conditions, and excessive compensation schemes imposed upon competitive providers. In adopting such rules, the Commission should also make clear that existing arrangements which violate these provisions may be challenged by providers and set aside by the Commission. Without rules firmly in place at a federal level addressing these issues, state and local governments across the country will continue to have the power to extract a litany of burdensome concessions, which can amount to what one court has termed "legalized extortion and a crippling of communication and commerce as we know it." *City of Hawarden v. U S West Communications, Inc.*, 590 N.W.2d 504, 508 (Iowa 1999).

**1. Proper Scope of Management Authority**

Both the Commission and the courts have ruled on the proper scope of state and local governments' authority to manage public rights-of-way. As explained by the Commission, "[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage . . . facilities' in the rights-of-way." NOI ¶ 75 (citing *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396 ¶ 105 (1997), *recon. denied*, 13 FCC Rcd 16400 (1998))("Oakland County").

The Commission has further described the types of activities that fall within the "range of vital tasks" necessary to properly manage public rights-of-way. These activities include "coordination of construction schedules, determination of insurance, bonding and indemnity

requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them." *Id.* See also *Classic Telephone*, 12 FCC Rcd ¶ 34 n.102.

Several federal courts have followed the Commission's interpretation of the proper scope of rights-of-way management and issued decisions limiting state and local regulation accordingly. For example, the court in *Prince George's County* held that "the terms of any such franchise must be limited to the types of activities described by the FCC in *TCI Cablevision* [of *Oakland County*] and *Classic Telephone*. Any attempt to regulate telecommunications companies beyond this fairly narrow scope exceeds the County's authority under federal law." *Prince George's County*, 1999 U.S. Dist. LEXIS at \*31. Accord, *BellSouth Telecommunications, Inc. v. City of Coral Springs*, Fl., 42 F. Supp. 2d 1304, 1999 U.S. Dist. LEXIS 1808, \*7 (S.D. Fla. Jan. 25, 1999)(citing *Oakland County* and *Classic Telephone*)("City of Coral Springs"); *AT&T Communications, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 592-93 (N.D. Texas 1998)(citing *Oakland County* and *Classic Telephone*)("City of Dallas").

The legislative history of Section 253 of the Telecommunications Act of 1996 confirms these conclusions that the permissible scope of state and local government management authority is quite narrow. For example, during the Senate floor debate on the 1996 Act, Senator Feinstein offered examples of the types of limited regulations that Congress intended to permit state and local governments to impose pursuant to Section 253(c), which included regulating the time or location of excavation, requiring a company to place its facilities underground rather than overhead, requiring a company to pay fees to recover an appropriate share of the increased street repair and paving costs, enforcing local zoning regulations, and requiring a company to indemnify the city against any claim of injury. See 141 Cong. Rec. S8172 (daily ed. June 12, 1995)(statement of Sen. Feinstein). The FCC has relied on this legislative history in interpreting the Act. See *Classic Telephone*, 12 FCC Rcd ¶ 34 n.102.

States and localities are thus permitted to impose requirements and assess charges only with respect to the specific and incremental burdens on their rights-of-way entailed by the competitive providers' access, and may not go beyond this sphere to impose more severe requirements and fees. The Commission should adopt this clear direction into rules plainly delineating the proper scope of state and local government management authority over public rights-of-way.

## **2. Limitation on Unrelated Conditions**

While Section 253 permits state and local governments to require telecommunications providers to enter into a franchise to use public rights-of-way, case law construing the section has repeatedly held that the franchise cannot impose conditions that are not directly related to the management of local rights-of-way, and that the franchise must be conditioned solely on a company's agreement to comply with the city's reasonable regulation of its rights-of-way. *See Prince George's County, supra; City of Coral Springs, supra; City of Dallas, supra.*

For example, several federal courts have rejected local governments' attempts to require information pertaining to a company's financial qualifications, or the technical standards that the company intends to follow, or any other information relating to the company's managerial or legal qualifications to construct and operate a telecommunications system. *See Prince George's County, supra; City of Coral Springs, supra; City of Dallas, supra.* Moreover, a franchising authority cannot require a telecommunications company to provide the locality with ubiquitous services or dedicate ducts or conduits to the city's exclusive use, nor can it require the company to maintain detailed records subject to the city's approval. *See City of Dallas, supra.*

The rules established by the Commission should thus also expressly preclude local franchising authorities from imposing unrelated and burdensome conditions that only serve to impede competitive entry. The conditions which have been invalidated in previous decisions

construing Section 253 are illustrative, but the rules should also make clear that other conditions having the same effect are invalid as well.

### **3. Limitation on Excessive Compensation Schemes**

In addition to defining the proper scope of state and local management authority and prohibiting the imposition of unrelated conditions on telecommunications companies, courts have also limited franchising authorities' attempts to extract excessive compensation for use of their rights-of-way. Courts have held that "any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier to entry under section 253(a)." *Prince George's County* at \*35 (rejecting 3% gross revenue fee). *See also City of Dallas, supra* (rejecting 4% gross revenue fee); *City of Hawarden v. U S West Communications, Inc.*, 590 N.W.2d 504 (Iowa 1999)(rejecting 3% gross revenue fee).

In other words, "local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way. Franchise fees thus may not serve as general revenue-raising measures." *Prince George's County*, 1999 U.S. Dist. LEXIS at \*35. Again, the legislative history of the 1996 Act confirms congressional intent in this area. *See* 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995)(statement of Rep. Stupak).<sup>5</sup> The "appropriate benchmark is not the 'value' of [the company's] 'privilege' of using the County's public rights-of-way . . . Rather, the proper benchmark is the cost to the County of maintaining and improving the public rights-of-way that [the company] actually uses." *Prince George's County*, 1999 U.S. Dist.

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<sup>5</sup> Representative Bart Stupak, along with Representative Joe Barton, sponsored the amendment, which ultimately became Section 253(c), rejecting the provision in the original bill that required localities to impose the same fees on all telecommunications providers regardless of how much or how little they use the public rights-of-way. Rep. Stupak, and ultimately Congress, rejected this "parity" provision stating that localities must distinguish between different providers based on the extent and intensity of their right-of-way use. This supports the conclusion that the purpose of Section 253(c) is to enable state and local governments to recoup "fair and reasonable compensation" according to the provider's actual physical use of the rights-of-way, and not as a general revenue raising measure.



LEXIS at \*38.<sup>6</sup> Global Crossing believes that this is the appropriate standard under federal law and Commission policy governing franchise fees.

Formulated into a body of rules, the Commission's determinations in these three critical areas will permit state and local governments to fulfill their legitimate role as managers of public rights-of-way, while proscribing regulatory overreaching that impedes competitive access to rights-of-way. Without such a unified framework set forth at the federal level, state and local governments across the country are likely to continue to extract overly burdensome concessions, including exorbitant franchise fees, from competing telecommunications providers, raising the costs of and potentially delaying the deployment of competitive backbone facilities.

#### **IV. THE COMMISSION'S RULES MUST INCLUDE AN ENFORCEMENT MECHANISM**

The Commission's rules must include an effective enforcement mechanism, without which any set of rules, no matter how well-intentioned, will prove fruitless. The rules must provide a time frame for decisions on rights-of-way requests and establish procedures that will provide a prompt and effective resolution of disputes. The ability to rapidly deploy their networks is critically important to new entrants. Capacity on networks is often pre-sold, and capacity agreements can include firm commitments on RFS dates. At the same time, marketplace forces often lead providers to accelerate RFS dates. As a result, delays in deployment resulting from recalcitrant rights-of-way holders can have real and costly marketplace consequences for competitive providers. Given the choice between potential

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<sup>6</sup> An analogy can be made to the permissible scope of license or user fees imposed by a federal agency, which also must be sufficiently related to the interests underlying the license requirement, and "cannot load on expenses in the guise of collecting licensing fees." *Seafarers Int'l Union of N. America v. United States Coast Guard*, 81 F.3d 179, 186 (D.C. Cir. 1996). A recent decision in *Omnipoint Communications, Inc. v. Port Authority of New York & New Jersey*, 1999 WL 494120 (S.D.N.Y. July 13, 1999) found that a plaintiff had not met its burden of showing a "clear and substantial" violation of Section 253 (a standard required because plaintiff requested a preliminary mandatory injunction) where there was no allegation or evidence that the fees sought by the Port Authority "exceed[ed] its reasonable costs to construct, maintain and administer the planned telecommunications network." *Id.* at \*7. The Court also referred to a multi-factor test propounded in *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785, 789 (E.D. Mich. 1998). Global Crossing respectfully submits that adoption of a vague, multi-factor test will not provide the regulatory certainty that new entrants need, and will not serve as an effective check on unreasonable and unwarranted assessments by state and local governments.

litigation or an immediate right-of-way grant that is conditioned on unlawful, costly and burdensome concessions, the provider often has little real choice. Thus, substantive rules that do not include a time frame for grant and expedited resolution provisions provide no relief at all. Accordingly, any enforcement mechanism must encompass both a time requirement on state and local governments, as well as an expedited dispute resolution process akin to the Commission's new expedited common carrier complaint procedures.

Global Crossing respectfully suggests that state and local authorities be given a time period of no more than 45 days to act on a request for access to the public rights-of-way. In Global Crossing's experience, such a time period is more than adequate to deal with any legitimate issues raised by a request. In addition, the rules should provide that disputes arising out of requests for access may be brought before the Commission via a complaint filed by either party, and that the Commission or its delegated authority will issue a decision on the matter within 45 days of receiving the complaint.<sup>7</sup>

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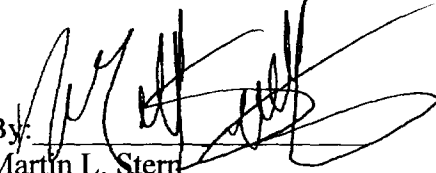
<sup>7</sup> The Commission may wish to set more specific time deadlines as to when and if a response to the complaint shall be filed, and any other information that is required or desired to be submitted.

## CONCLUSION

For the foregoing reasons, Global Crossing respectfully requests that the Commission act expeditiously to eliminate unnecessary and unreasonable barriers imposed by state and local management and control of rights-of-way, which are critical inputs into the deployment of next generation telecommunications networks. The Commission should adopt a unified body of rules governing the proper scope of state and local management of public rights-of-way and put in place expedited enforcement procedures in order to provide regulatory certainty and speed facilities-based entry.

Respectfully submitted,

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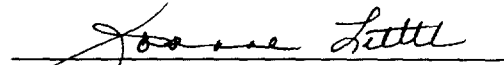
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Dated: October 12, 1999

## CERTIFICATE OF SERVICE

I, Joanne Little, do hereby certify that copies of the foregoing Comments of Global Crossing Ltd. have been served on the persons listed below, as indicated, on this 12th day of October, 1999.

  
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